In the Supreme Court of the United States

OCTOBER TERM, 1921.

PINE HILL COAL COMPANY, INC., *Appellant*,
v.
THE UNITED STATES.
No. 101.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on appeal from the judgment of the Court of Claims dismissing claimant's petition on demurrer. R. 48. The petition recites action taken under authority granted by the Act of August 10, 1917, c. 53, 40 Stat. 276, by the President and the Fuel Administration establishing from time to time maximum prices for which anthracite coal might be sold on the market by producers to private consumers. From September, 1917, to January, 1919, claimant sold 239,400 tons at prices thus fixed. During the same period, considerable additional tonnage, comprising varieties the price of which had not been fixed, was sold at market prices. Lumping together both these items, the cost of production (in-

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cluding expenses of operation, maintenance, depreciation and depletion) of all coal sold during this period is alleged to have been $838.25 more than total receipts. R. 24. Losses and profits in detail for each month are specified but in every instance these monthly computations are based on production cost of coal sold under government prices mingled with that sold at unregulated market prices. It is averred that the maximum prices fixed by the government were unsatisfactory and did not afford just compensation; that a just and reasonable profit, and a profit which might have been received but for the price restriction, would have been 75 cents per ton. Adding this in for the entire period claimant concludes that federal regulation has deprived it of $239,261.96.

The duty prescribed to the administration by §25, paragraph 15, to fix a price including just and reasonable profit over costs, etc., is pleaded and as well the provisions of §25, paragraph 4, providing for compensation in the contingencies therein set forth. It is then alleged that, in consequence of the statute and of the administrative orders thereunder, a contract was created between the claimant and the United States and that by this contract the United States was obligated to claimant for a sum which added to the amount received from sales at government prices would be just compensation for the coal thus sold. The sum claimed is $239,261.96, which, as seen, represents profits at 75 cents per ton.

ARGUMENT.

Definition of appellant's contentions.

Claimant seems to concede the constitutionality of the statute and the power of Congress in time of war and in the interest of its successful prosecution to fix the price and regulate the sale of this indispensable commodity. The constitutional validity of these provisions cannot be doubted.

Cf. *Hamilton* v. *Kentucky Distilleries*, 251 U. S. 146;

Jacob Ruppert v. *Caffey*, 251 U. S. 264;

Block v. *Hirsh*, 41 Sup. Ct. Rep. 458;

Marcus Brown Holding Co. v. *Feldman*, 41 Sup. Ct. Rep. 465;

People ex rel. Realty Corporation v. *La Fetra*, 230 N. Y. 429.

If the hypothesis be indulged that the statute is unconstitutional or that administrative action taken thereunder is void because not justified thereby, it would follow that jurisdiction in the Court of Claims, as defined by §145 of the Judicial Code, to adjudicate any loss thereby occasioned does not exist. Counsel are aware of no case holding generally that obedience to unconstitutional and void legislative regulation or to confiscatory administrative orders raises an obligation cognizable in the Court of Claims to compensate for loss of profits thereby occasioned.

Claims founded on the Constitution belonging to the class justiciable in the Court of Claims are those sounding *in contract only*.

Mann v. *United States*, 32 Ct. Cl. 580;
Hill v. *United States*, 149 U. S. 593, 598-9;
Harley v. *United States*, 198 U. S. 229, 234;
Russell v. *United States*, 182 U. S. 516, 530;
Tempel v. *United States*, 248 U. S. 121.

An obligation to indemnify arises only when the injury inflicted is the consequence of official action having the express or necessarily implied authority of a statute.

Hollister v. *Benedict Mfg. Co.*, 113 U. S. 59, 67;
United States v. *Lynah*, 188 U. S. 445, 461–468;
United States v. *North American Co.*, 253 U. S. 330, 335;
Sutton v. *United States*, decided June 1, 1921, 41 Sup. Ct. Rep. 563.

No contract enforceable against the United States in the Court of Claims can be implied from a tort.

Bigby v. *United States*, 188 U. S. 400, 404-407;
Schillinger v. *United States*, 155 U. S. 163;
Basso v. *United States*, 239 U. S. 602;
United States v. *Holland-America Lijn.*, 254 U. S. 148.

Or from the act of an officer or agent acting without the scope of his authority as defined by law; e. g., if he acts under an unconstitutional statute. The prohibitions of the fifth amendment are directed against the United States, not against public officers proceeding without legislative authority.

Cf. *Hooe* v. *United States*, 218 U. S. 322, 326, 335.

If, therefore, claimant's expected profits were confiscated by an administrative order unauthorized by law or one based on a void statute, the injury com-

plained of was either a simple tortious interference with claimant's property or at most it was an act not contractually binding the United States because of lack of authority in the official promulgating the order. In either case jurisdiction under § 145 is lacking. To state the matter in another form: If this Act was unconstitutional or if the prices administratively fixed were confiscatory, claimant's remedy was to refuse obedience or to enjoin unauthorized interference with his business.[1]

Since it is established that injunction is ordinarily the remedy available against unconstitutional legislation or confiscatory regulation, claimant is driven to the contention that *by the terms of the Lever Act* Congress has acknowledged the contractual liability of the United States to reimburse profits of which it was deprived by valid price regulation and has afforded a remedy by which they may be recovered.

This contention is based on paragraphs 1 and 4 of §25 of the Lever Act, and the question presented, therefore, is what is the proper construction of the text.

Indemnity to regulated industries is not generally an incident, nor is it a condition to legislative control.

Paragraph 1 is manifestly but an exercise of power of regulation and considered by itself no assumption of obligation to compensate for losses can be implied from its terms.

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[1] Cf. *In re Engelhard*, 231 U. S. 646.

The paragraph imposing penalties is hardly applicable. But even if it were it would not be an effectual obstacle to relief by injunction. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331.

Public regulation of industries does not involve exercise of the power of eminent domain. Contentions that reasonable regulation, imposing burdens or diminishing the usefulness of property or the returns otherwise obtainable from it, amounts to an expropriation requiring indemnity have been everywhere denied.

Legal Tender Cases, 12 Wall. 457, 551;
Transportation Co. v. *Chicago*, 99 U. S. 635, 642;
Gibson v. *United States*, 166 U. S. 269, 271, 275–6;
Scranton v. *Wheeler*, 179 U. S. 141, 164;
Wisconsin, etc., R'd. v. *Jacobson*, 179 U. S. 287, 296, 301;
Railroad v. *Mottley*, 219 U. S. 467;
C. B. & Q. Ry. v. *Drainage Com'rs. etc.*, 200 U. S. 561, 582–4, 590–4;
Atlantic Coast Line v. *Goldsboro*, 232 U. S. 548, 558;
Hamilton v. *Kentucky Distilleries*, 251 U. S. 146, 156–7;
Budd v. *New York*, 143 U. S. 517, 528;
Brass v. *Stoeser*, 153 U. S. 391, 399.

Does the text of paragraph 4 alter this principle and has Congress therein admitted obligation to reimburse whenever prices fixed under paragraph 1 failed to provide expected profits?

Many statutes controlling industries and prices have been passed. In none of them, perhaps, does any provision for indemnity by the sovereign appear. The rule of uncompensated obedience to regulation under State police power or under delegated Federal power has been so generally carried out

in legislation that it will require clear and unmistakable language to convince this court that Congress, when it undertook during the war to fix maximum prices for coal, intended also to obligate the United States to reimburse the regulated industries the profits which might have accrued in the absence of regulation.[2]

Appellant did not attempt to enjoin the orders which it now says confiscated its profits. It complied with them. If, in fact, Congress intended to consent that the government may now be sued for these profits, this intention would naturally have been clothed in clear language and not left to vague implication and uncertain inference.

In its main features the Lever Act is a statute contemplating and providing for war time *regulation* of production, prices, sale and distribution of necessaries. In effect it declares that these things were affected with a public interest and that government control was essential to effective prosecution of the war. Wherever the power of eminent domain (or as usually designated, the power of requisition) is brought into play, the statute makes careful and ample provision for indemnity and for judicial review of compensation administratively determined.[3]

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[2] It may be noted here that in order to stimulate wheat production Congress by §14 declared an obligation which took the form of a guarantee of minimum prices to producers of wheat. But this obligation is declared in clear and unmistakable language.

[3] By §10, when food or fuel is requisitioned for the support of the army or the maintenance of the navy or any other public use connected with the common defense, indemnity is provided for, which, if unsatisfactory, may be adjusted by suit against the United States.

But there can be no substantial doubt that paragraph 1 of §25 was enacted with the single design of subjecting the coal industry to legitimate war time restrictions as to price and distribution as *between producer and customer generally*. As in similar statutes creating public utilities commissions, administrative agencies were set up to carry out the legislative purpose and administrative machinery was provided for inquiry into cost of production, etc., to furnish the basis for price regulations.[4]

By §12, for the same public purposes, authority is given to requisition and take over factories, mines, etc. Compensation and judicial review thereof, if unsatisfactory, is provided for.

By §16, on like condition of indemnity and judicial review, distilled spirits may be commandeered for manufacture of munitions, military and hospital supplies.

By paragraphs 6–10, inclusive, of § 25 the President is empowered to require any or all producers of coal or coke to sell their products only to the United States through a designated agency, and through this agency to resell the coal under regulations to be established. In the exercise of this power authority is given to fix a price to producers and to be received by the government on resale. Since this provision involved, practically, an expropriation of the products of mines, it is provided that the prices to be paid include a profit above cost of production, and, if the price fixed be unsatisfactory, that the producer be paid 75 per cent of the amount fixed and be entitled to sue the United States to recover such additional sum as would constitute just compensation.

[4] Paragraphs 13–15 of § 25 read:

Having completed its inquiry respecting any commodity in any locality, it shall, if the President has decided to fix the prices at which any such commodity shall be sold by producers and dealers generally, fix and publish maximum prices for both producers of and dealers in any such commodity, which maximum prices shall be observed by all producers and dealers until further action thereon is taken by the commission.

In fixing maximum prices for producers the commission shall allow the cost of production, including the expense of operation, maintenance, depreciation and depletion, and shall add thereto a just and reasonable profit.

In fixing such prices for dealers, the commission shall allow the cost to the dealer and shall add thereto a just and reasonable sum for his profit in the transaction.

The legislative history of § 25 is somewhat unusual. It was first introduced as a whole in the Senate as an amendment to a pending bill passed by the House (Cong. Rec., 65th Cong., 1st Sess., vol. 55, Pt. 5, pp. 5310–11) and was substantially altered in conference. In reporting it to the House, the House Conferees called attention explicitly to the provisions allowing compensation in cases where the power of requisition or the power to compel purchase was conferred, but they omitted any reference whatever to the extraordinary contention of claimant that the amendment was designed to obligate the government to reimburse operators for all losses occasioned by the fixing of prices. See Conferees Report, H. R. 65th Cong., 1st Sess., Report No. 117, page 18, amendment 69; Cong. Rec. 65th Cong., 1st Sess., vol. 55, pt. 6, pp. 5734, 5738.[5]

[5] In the conference report § 25 appears as Senate Amendment 69. The statement of the managers on the part of the House reads:

Amendment No. 69: This amendment inserts a new section 22, providing for comprehensive governmental control of the coal and coke business, including the fixing and regulating of prices, the requisitioning and operating of plants and businesses, the governmental purchase and sale of coal and coke, and a detailed investigation of the coal and coke business. The House recedes and agrees with an amendment changing the section number to 25; limiting the operation of the section to the period of the war; extending the power of regulation by the President to include the method of production, in addition to the sale, shipment, distribution, apportionment, or storage, of coal and coke; eliminating recourse to the Board of Mediation and Conciliation by any person dissatisfied with wages fixed by the President; reducing the amount to be paid to any person dissatisfied with the compensation fixed in the exercise of the requisitioning or purchasing power to 75 per cent instead of the entire amount, with the right to sue the United States to recover such further sum as added to said 75 per cent will constitute just compensation; eliminating the provision that there shall be but one dealer between the producer and consumer in fixing maximum prices for dealers; and making other changes of a minor or incidental nature.

Guided by the foregoing we come to consider the connection between regulations prescribed in paragraph 1 and the provisions of paragraphs 2 to 5 and the real significance of the language used in paragraph 4. The text is inserted for convenience:

> SEC. 25. That the President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary.
>
> That if, in the opinion of the President, any such producer or dealer fails or neglects to conform to such prices or regulations, or to conduct his business efficiently under the regulations and control of the President as aforesaid, or conducts it in a manner prejudicial to the public interest, then the President is hereby authorized and empowered in every such case to requisition and take over the plant, business, and all appurtenances thereof belonging to such producer or dealer as a going concern, and to operate or cause the same to be operated in such manner and through such

agency as he may direct during the period of the war or for such part of said time as in his judgment may be necessary.

That any producer or dealer whose plant, business, and appurtenances shall have been requisitioned or taken over by the President shall be paid a just compensation for the use thereof during the period that the same may be requisitioned or taken over as aforesaid, which compensation the President shall fix or cause to be fixed by the Federal Trade Commission.

That if the prices so fixed, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this Act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

While operating or causing to be operated any such plants or business, the President is authorized to prescribe such regulations as he may deem essential for the employment, control, and compensation of the employees necessary to conduct the same.

The purpose of paragraphs 2–5 seems very clear. It was, of course, foreseen that some coal producers,

dissatisfied with the government price, might stop production, hoping to conserve their holdings to be mined and sold after the war at better profit. To prevent lessening of supply on this and on other accounts paragraph 2 provides for requisitioning the plant or the business of such producers, etc., *as a going concern* and its operation through agencies selected by the government and under regulations to be prescribed. Since this involved exercise of eminent domain power, indemnity and judicial review thereof were carefully provided for.

As, conceivably, mines would be shut down only because the price for coal taken therefrom was fixed too low, taking over the mine would be necessary only when the owner, dissatisfied with the price, resorted to the expedient of ceasing or curtailing operation. Paragraph 4 can be easily read as applicable entirely to the provisions authorizing such federal operation in case of the owner's failure or neglect. Without violent distortion, its text may be construed as meaning that if, *because of dissatisfaction with the government price*, the producer ceased to operate, etc., thus necessitating a requisition of either the mine or the business, the owner would be entitled to 75 per cent of compensation administratively determined and to sue for a balance representing just compensation.

Moreover, by a fair construction of the wide powers conferred by paragraph 2, governmental expropriation (in the case of neglect or failure to operate) might be either complete or partial.

a. The government, if thought necessary, might take over the entire operation of a plant, including

mining of the coal, paying employees, and selling the product. In this case, obviously, compensation would be measured by whatever sum might be adjudicated as just for temporary use of the entire property—the lease value, perhaps, plus consequential damages.

b. It might, however, be thought more judicious to leave to the owner the actual operation of his mine under prescribed regulations and government supervision, the government taking over *only the business of selling and distributing the product*, i. e. to take over the mined coal on government account and direct its distribution on government account. In that case, since the price received by or credited to the business would be the government price, and since this would be the relevant and controlling fact both in inducing dissatisfaction in the mind of the owner and in the judicial adjustment of compensation, the meaning of the phrase "if the prices so fixed" employed in paragraph 4 becomes comprehensible.

Mention has already been made of the power granted to require all producers to sell only to the United States at a fixed price judicially reviewable if unsatisfactory. Paragraphs 6, 8. Paragraph 4 contains identical provisions for judicial review of prices fixed in the special case now under discussion, namely, when, because of recalcitrancy of a producer the government under paragraph 2 compels him for this reason to turn over the sale of his product on government account.

It can not be denied that the text is awkward and obscure and that some astuteness in construction will be requisite. It is insisted that an obligation to indemnify is assumed in this statute only when an expropriation or requisition is authorized. The construction urged by appellant that, in complete ignorance of the enormous liabilities to be fastened on the taxpayer, and contrary to all precedent, Congress, by force of an obscure implication hidden in paragraph 4, intended to involve the government in suits to recover lost profits *by every coal producer and dealer in the United States who operated under Federal regulation* whether his plant was or was not requisitioned, is wholly unreasonable.

As already argued, if confiscation of appellant's profits was threatened by government price fixing, its remedy was to seek an injunction.

Moreover, it is impossible to apply appellant's interpretation to the text. There was no exercise of authority conferred by paragraph 2 to requisition appellant's plant or product or of that conferred by paragraph 6 to force sale of its product to the government. Its coal was sold to private customers and though it now protests that it was unsatisfactory and unprofitable, nevertheless the government price was paid to it in full by its customers.

Applying its contention that paragraph 4 created a federal obligation for the difference between the government price and an adequate price, what was the course there marked out to secure relief? Applying literally the text, it was to accept 75 per cent

only from its customers and then to sue the United States for the remainder. It would follow that the private purchaser, if the seller was dissatisfied, need pay only 75 per cent, leaving the government to pay the balance. In other words, the government stood ready to pay the difference between 75 per cent of the fixed price and the fair market value of the coal although none of it was taken or used for any public purpose whatever. An obvious absurdity!

Moreover, confronted with the fact that it has received not 75 per cent but the whole of the government price from its customers, appellant is unable to bring its case within even the letter of the remedy provided by the statute. And, therefore, conceding even this absurd construction, the government may defend this action upon the ground that acceptance of the full price has, under the literal terms of the statute, barred this claim.

Realization of this has doubtless driven counsel to the contention that the language of paragraph 4 may be construed to mean that after receiving from its customers the *whole of the price fixed*, appellant was thereafter entitled to sue the United States to recover lost profits. It becomes, however, immediately manifest that this construction can be supported only by forcibly interpolating words which do not appear in the paragraph.

To connect paragraph 4 with the price-fixing power conferred by paragraph 1 appellant would have the

court amend paragraph 4 so as to make it read substantially as follows:

> That if the prices so fixed *be not satisfactory to the person or persons entitled to receive the same, such persons shall be entitled to receive from the persons to whom coal has been sold the price fixed therefor by the President, and shall be entitled to sue the United States to recover such further sum as added to said price shall afford a fair and reasonable profit on the coal sold to said consumers*, or if, in the case of the taking over or requisitioning of the mines or business of any such producer or dealer the compensation therefor as determined by the provisions of this Act be not satisfactory to the person or persons entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation in the manner provided by section twenty-four, paragraph 20, and section one hundred and forty-five of the Judicial Code.

The words in italics are not in the statute and to sustain appellant's contention must be forced in by construction.

Considering that thereby the United States are onerated with an unprecedented obligation to bear losses occasioned by the necessary and usual exercise of well established powers, the government confi-

dently submits that an interpretation so distorted and radical will not be accepted and that this court will be guided by the clear presumption that, in regulating between producer and consumer industries affected in time of war by a vital public interest, Congress did not intend to authorize suit against the government to recover profits which otherwise, possibly, might have accrued.

The statute enjoined federal investigation of cost of production and required addition thereto of a fair profit in establishing the government price. It may be true that, though compliance with the statute was attempted, the price fixed by the Fuel Administration possibly failed to afford expected profits on the output of every mine. But it does not necessarily follow that profits would otherwise have actually accrued. This is a case where Congress has declared the essential need, in the common interest and in the common defense, of restricting the price of a necessary commodity. In isolated instances the result has been that expected profits did not materialize. If, however, because of failure to restrain its mounting costs the war had been lost, it is not inconceivable that not only appellant's profits but its mine and plant might have met destruction at the hands of the enemy. Since appellant did not see fit to test by injunction the validity and reasonableness of the price-fixing order of the Fuel Administration, the disappointment of which it now complains must be

borne as were thousands of others occasioned by the war without recompense from the Treasury.

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